IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 1ST JANUARY 2007 / 11TH POUSHA, 1928

Crl.MC.No. 3069 of 2006()

CC.2710/2003 of JUDL. MAGISTRATE OF FIRST CLASS-I, KOCHI

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PETITIONER: ACCUSED

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1. M/S.G.V.J.PROPERTIES (P) LTD.,
   REPRESENTED BY CHAIRMAN & MANAGING DIRECTOR,
   MOHAN VETTATH, G.V.J. HOUSE, 39/2079,
   KUNNUMPILLY LANE, KOCHI-16.

2. MOHAN VETTATH, CHAIRMAN & MANAGING
   DIRECTOR, M/S.GVJ PROPERTIES (P) LTD.,
   G.V.J. HOUSE, II/225, NELSON MANDELA ROAD,
   MULANTHURUTHY.

3. GEORGE PAUL, DIRECTOR,
   M/S.G.V.J. PROPERTIES (P) LTD.,
   HOUSE NO.160, PANAMPILLY NAGAR, KOCHI-36.

4. DAVID GEORGE, DIRECTOR,
   M/S.G.V.J.PROPERTIES (P) LTD.,
   VETTATH HOUSE, WARRIAM ROAD, KOCHI-16.

5. ROSHINI MOHAN,
   M/S.G.V.J. PROPERTIES (P) LTD.,
   G.V.J. HOUSE, II/225, NELSON MANDELA ROAD,
   MULANTHURUTHY.

BY ADV. SRI.N.J.MATHEWS
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENTS: COMPLAINANT

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1. LORD KRISHNA BANK LTD.,
   BROADWAY, ERNAKULAM REP.BY ITS CHIEF MANAGER,
   P.AJITH KUMAR RESIDING AT 35/2825/C, SRIVISHAK,
   M&B LANE, THAMMANAM, PALARIVATTTOM P.O.,
   COCHIN-25.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR.

R1 BY ADV. SRI.S.R.DAYANANDA PRABHU

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 01/01/2007, ALONG WITH CRMC NOS. 3647 OF 2006 & CRMC NO. 3666 OF 2006 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.Nos. 3069, 3647 &
3666 of 2006

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Dated this the 1st day of January, 2007

O R D E R

The petitioners in these Crl.M.Cs. are accused Nos. 1 to 5 in three separate prosecutions, all under Section 138 of the N.I. Act initiated by the first respondent Bank. The cheques concerned are for Rs.95,000/- (two cheques) and Rs.3,80,000/- respectively.

2. Cognizance has been taken by the learned Magistrate. The proceedings are pending before the learned Magistrate. The petitioners have come to this Court with an identical prayer that the prosecutions against all the accused persons may be quashed invoking the powers under Section 482 Cr.P.C.

3. What is the ground? Two separate grounds are taken. The first ground applies only to accused Nos. 3 to 5. The counsel contends that no specific allegation whatsoever has been raised against accused Nos. 3 to 5 to justify initiation of these prosecutions under Section 138 of the N.I. Act against them. The first accused company is the drawer of the cheque. The second accused is the

Managing Director of the Company, who had allegedly signed the cheques. So far as accused Nos. 3 to 5 are concerned, there is no specific allegation whatsoever against them in the body of the complaint. In the cause title they are described as Directors of the first accused company.

4. The learned counsel for the petitioners submits that accused Nos. 3 to 5 being not the drawees of the cheques themselves or Directors/persons in charge and responsible to the company for the conduct of its affairs, the prosecutions initiated against them is misconceived and are liable to be quashed. The counsel, in particular, relies on the dictum in **S.M.S. Pharmaceuticals Ltd.** v. **Neeta Bhalla & anr.** ((2005) 8 SCC 89).

5. Accused Nos. 3 to 5 being not the drawees of the cheques or the persons in charge of and responsible to the company for the conduct of its affairs, they cannot be made liable with the help of Section 138 or with the help of Section 138 r/w. 141 of the N.I. Act. Crucial and vital averments which are necessary to saddle the accused 3 to 5 (even admitting that they are Directors of the company) with culpable liability under Section 138 r/w. 141 of the N.I. Act are absent. It follows therefore that accused 3 to 5 are entitled to succeed and proceedings against them are liable to be quashed.

6. The learned counsel for the complainant/first respondent is unable to point out any specific circumstance which can help the respondent/ complainant to raise a valid allegation that respondents 3 to 5 are also liable under Section 138 or under Section 138 r/w. 141 of the N.I. Act. The challenge by accused 3 to 5 must, in these circumstances, succeed.

7. The second contention is about the liability of accused 1 and 2. The contention is founded on Annex.A1 order passed by the Debt Recovery Tribunal on the basis of a compromise entered between the parties. It is significant that admittedly the entire amounts due under the compromise agreement has not been paid even now. Annex.A1 does not at all indicate that these prosecutions, which were pending at the time when Annex.A1 order was passed, had been settled and compounded. In these circumstances the prayer to quash the complaints in so far as it relates to accused 1 and 2 on the basis of the compromise which led to Annex.A1 order cannot be sustained.

8. The learned counsel for the petitioners/accused 1 and 2 contends that though composition of the offence under Section 138 of the Act cannot be inferred, it must be seen that the liability was settled at a specific amount and payments have been made towards such agreed amount. When that is

taken into account, the total amount which will be due falls short of Rs.5,70,000/-, which is the total amount due under the three cheques. The argument is that in view of the subsequent settlement under Annex.A1 the amount due is less than the sum total of the amount due under the three cheques. In these circumstances the cheques cannot be said to be issued for the discharge of any legally enforceable debt/liability, as the total amount of Rs.5,70,000/- is not actually due now.

9. The learned counsel for the complainant contends that the petitioners can take advantage of Annex.A1 order only if they have complied with the stipulations in the said order, Annex.A1, and that having not been done, the entire amount, including the amount shown in the three cheques, are due.

10. I need not, in the facts and circumstances of these cases, proceed to resolve this dispute invoking the powers under Section 482 Cr.P.C. It will certainly be open to the petitioners 1 and 2 to raise such contentions before the trial court. The trial court must pass appropriate orders considering those contentions.

11. In the result:

(a) These Crl.M.Cs. are allowed in part.

(b) C.C. Nos. 2710, 2711 and 2712 of 2003, all pending before the J.F.C.M.- I, Kochi are quashed in so far as they relate to petitioners/accused 3 to 5. Prosecutions in so far as they relate to petitioners/accused 1 and 2 shall continue. Needless to say they shall be entitled to raise all appropriate and relevant contentions before the learned Magistrate and the dismissal of these Crl.M.Cs. in so far as they are concerned shall not in any way fetter their rights to raise all necessary and appropriate contentions before the learned Magistrate.

(R. BASANT)
Judge

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